

Sep 24, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARLENE LENE B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant.

No. 1:17-cv-03208-SAB

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 10, and Defendant's Cross-Motion for Summary Judgment, ECF No. 11. The motions were heard without oral argument. Plaintiff is represented by D. James Tree; Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney Summer Stinson.

Jurisdiction

On March 6, 2014, Plaintiff filed a Title II application for disability insurance benefits. Plaintiff alleges an onset date of February 4, 2014.

Plaintiff's application was denied initially and on reconsideration. On April 5, 2016, Plaintiff appeared and testified at a hearing held in Yakima, Washington before an ALJ. Plaintiff testified and was represented by counsel, Robert Tree. Kimberly Mullinex, M.A. also appeared and testified as a vocational expert.

The ALJ issued a decision on December 21, 2016, finding that Plaintiff was

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 not disabled. Plaintiff timely requested review by the Appeals Council, which
2 denied the request on October 16, 2017. The Appeals Council's denial of review
3 makes the ALJ's decision the final decision of the Commissioner.

4 Plaintiff filed a timely appeal with the United States District Court for the
5 Eastern District of Washington on December 12, 2017. The matter is before this
6 Court under 42 U.S.C. § 405(g).

7 **Sequential Evaluation Process**

8 The Social Security Act defines disability as the inability "to engage in any
9 substantial gainful activity by reason of any medically determinable physical or
10 mental impairment which can be expected to result in death or which has lasted or
11 can be expected to last for a continuous period of not less than twelve months."

12 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant shall be determined
13 to be under a disability only if her impairments are of such severity that the
14 claimant is not only unable to do her previous work, but cannot, considering
15 claimant's age, education, and work experiences, engage in any other substantial
16 gainful work which exists in the national economy. 42 U.S.C. § 423(d)(2)(A).

17 The Commissioner has established a five-step sequential evaluation process
18 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Tackett*
19 *v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

20 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
21 § 404.1571. Substantial gainful activity is work done for pay and requires
22 compensation above the statutory minimum. 20 C.F.R. §§ 404.1510, 1572. If the
23 claimant is engaged in substantial activity, benefits are denied. 20 C.F.R. §
24 404.1520(a)(4)(i). If she is not, the ALJ proceeds to step two.

25 Step 2: Does the claimant have a medically-severe impairment or
26 combination of impairments? 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant does
27 not have a severe impairment or combination of impairments, the disability claim
28 is denied. *Id.* A severe impairment is one that lasted or must be expected to last

1 for at least 12 months and must be proven through objective medical evidence. 20
2 C.F.R. § 404.1509. If the impairment is severe, the evaluation proceeds to the
3 third step. 20 C.F.R. § 404.1520(a)(4)(ii)

4 Step 3: Does the claimant's impairment meet or equal one of the listed
5 impairments acknowledged by the Commissioner to be so severe as to preclude
6 substantial gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii); 404.1520(d); 20
7 C.F.R. § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
8 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
9 impairment is not one conclusively presumed to be disabling, the evaluation
10 proceeds to the fourth step. 20 C.F.R. § 404.1520(e).

11 Before considering Step 4, the ALJ must first determine the claimant's
12 residual functional capacity. 20 C.F.R. § 404.1545. An individual's residual
13 functional capacity is her ability to do physical and mental work activities on a
14 sustained basis despite limitations from her impairments. *Id.*

15 Step 4: Does the impairment prevent the claimant from performing work she
16 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to
17 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform
18 this work, the evaluation proceeds to the fifth and final step.

19 Step 5: Is the claimant able to perform other work in the national economy
20 in view of her age, education, and work experience? 20 C.F.R. § 404.1520(g).

21 The initial burden of proof rests upon the claimant to establish a prima facie
22 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098. This burden is
23 met once a claimant establishes that a physical or mental impairment prevents her
24 from engaging in her previous occupation. *Id.* At step five, the burden shifts to the
25 Commissioner to show that the claimant can perform other substantial gainful
26 activity. *Id.*

27 //

28 //

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 3**

Standard of Review

The Commissioner's determination will be set aside only when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance." *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the ALJ's denial of benefits if the evidence is susceptible to more than one rational interpretation, one of which supports the decision of the administrative law judge. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court reviews the entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). "If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ." *Matney*, 981 F.2d at 1019.

A decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

Statement of Facts

The facts have been presented in the administrative transcript, the ALJ's decision, and the briefs to this Court; only the most relevant facts are summarized here.

At the time of the hearing, Plaintiff was 46 years old. She had previously worked for over 30 years in the insurance industry. After she was let go from her job for too many absences, she attempted to work at a flower shop. That job lasted

1 two weeks. She was fired because she was unable to master the computer and keep
2 up with the demands of the job.

3 Plaintiff has suffered from depression and anxiety for many years. She
4 attempted suicide twice, once in 1998 and another in the mid-2000s. She required
5 psychiatric hospitalization after her second suicide attempt. Although she returned
6 to work, she never returned to a full-time schedule and was calling in sick several
7 times per month. Eventually, she trained her replacement and she was fired from
8 her job.

9 Plaintiff has good days and bad days. On the good days, she is able to
10 complete craft projects, including making homemade cards and wreaths. On bad
11 days, she does not socialize and will spend the day on the couch. She is able to
12 complete housework and cooks for her family. She has been married for over 30
13 years.

14 **The ALJ's Findings**

15 The ALJ found that Plaintiff met the insured status requirements of the
16 Social Security Act through December 31, 2018. AR 20.

17 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
18 activity since February 4, 2012. AR 20.

19 At step two, the ALJ found Plaintiff has the following severe impairments:
20 major depressive disorder; anxiety disorder. AR 21.

21 At step three, the ALJ found that Plaintiff's impairments or combination of
22 impairments do not meet or medically equal any Listing. AR 21. Specifically, the
23 ALJ reviewed Section 12.04 (affective mental disorders) and Section 12.06
24 (anxiety-related disorders) of the listings of impairments.

25 The ALJ concluded that Plaintiff has the residual functional capacity to
26 perform:

27 a full range of work at all exertional levels but with the following
28 non-exertional limitations. This individual is able to perform simple,

1 routine, repetitive tasks. She can have superficial, occasional contact
2 with co-workers and no contact with the public.

3 AR. 22. At step four, the ALJ found that Plaintiff was not capable of performing
4 past relevant work as an insurance clerk, but found she could perform other work
5 that exists in significant numbers in the national economy, including positions
6 such as kitchen helper; industrial cleaner; and laundry worker II. AR 27.

7 **Issues for Review**

- 8 1. Whether the ALJ properly considered and weighed the opinion evidence;
- 9 2. Whether the ALJ properly considered lay witness testimony from Glen Bangs;
- 10 3. Whether the ALJ properly evaluated Plaintiff's testimony regarding her
11 symptoms.

12 **Discussion**

- 13 1. *Whether the ALJ properly considered and weighed the opinion evidence*

14 Plaintiff argues the ALJ failed to properly consider and weigh the medical
15 opinion evidence.

16 The medical opinion of a claimant's treating physician is given "controlling
17 weight" as long as it "is well-supported by medically acceptable clinical and
18 laboratory diagnostic techniques and is not inconsistent with the other substantial
19 evidence in [the claimant's] case record." 20 C.F.R. § 404.1527(c)(2); *Trevizo v.*
20 *Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017). When a treating physician's opinion
21 is not controlling, it is weighted according to factors such as the length of the
22 treatment relationship and the frequency of examination, the nature and extent of
23 the treatment relationship, supportability, consistency with the record, and
24 specialization of the physician. § 404.1527(c)(2)-(6); *Id.* "If a treating or
25 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
26 may only reject it by providing specific and legitimate reasons that are supported
27 by substantial evidence. *Trevizo*, 871 F.3d at 675 (quoting *Ryan v. Comm'r of Soc.*
28 *Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)). "[A]n ALJ errs when he rejects a

1 medical opinion or assigns it little weight while doing nothing more than ignoring
2 it, asserting without explanation that another medical opinion is more persuasive,
3 or criticizing it with boilerplate language that fails to offer a substantive basis for
4 his conclusion.” *Garrison v. Colvin*, 759 F.3d 995, 1012–13 (9th Cir. 2014)
5 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)).

6 The record contains three opinions from medical professionals: Dr. Carina
7 Bauer, an examining medical source, Dr. Gordon Hale and Dr. Gollogly, who
8 provided a joint report as state-agency consultants, and Shannon Neer, PA-C, the
9 physician’s assistant who is treating Plaintiff.¹

10 **Dr. Carina D. Bauer**

11 Dr. Bauer interviewed Plaintiff on June 1, 2014. AR 286. She reported that
12 Plaintiff was soft-spoken, nervous, and shy during the examination. AR 290. She
13 spoke in a slow, soft, high-pitched voice. AR 290. Dr. Bauer described Plaintiff as
14 being dysphoric, sad, and anxious. AR 290.

15 Dr. Bauer gave the following conclusions after her examination:

16 Darlene appears capable of managing simple and repetitive tasks, as
17 well as detailed and complex tasks, evident in how well she
18 performed on the mental status examination and the hobbies she
participates in at home (i.e. making cards and wreaths).

19 Darlene appears able to accept instructions from supervisors evident
20 in how well she was able to understand this writer’s instructions on
the mental status exam.

21 Darlene appears to have some moderate difficulty interacting with
22 coworkers and the public. She appeared to be somewhat anxious
during this examination, evident in her having some difficulties
23 answering this writer’s questions and needing some support and
prompting. Also, she has a history of anxiety issues which may make
24 it challenging for her to adjust to a new work setting and have to
interact with customers and coworkers.

25 Darlene appears able to perform work activities on a consistent basis
without special or additional instructions.

26 Darlene appears to have moderate difficulty maintaining regular
27 attendance in the workplace. She may have difficulty completing a

28 ¹ The ALJ referred to Ms. Neer as Shannon Leer. AR 26.

1 normal workday/workweek without interruptions from psychiatric
2 conditions. Darlene noted, in her past job, she was able to maintain
3 employment there for 17 years because they provided a flexible and
4 supportive schedule and environment for her, especially at times
when she dealt with bouts of depression and had suicide attempts.
She'd likely benefit from flexibility and time off when dealing with
bouts of depression.

5 Darlene appears to have moderate difficulty managing usual stress in
6 the workplace. For instance, she noted having a lot of anxiety and
7 stress looking for a new job. She was able to manage the stress of her
8 past job for 17 years because they were very adaptive and flexible to
her needs and that it was a stable and supportive environment.
Likely working in a new environment with new people and new
tasks may cause an increase of anxiety and depressive symptoms.

9 AR 291-92.

10 **Dr. Gordon Hale and Dr. Vincent Gollogy**

11 On September 15, 2014, Dr. Gordon Hale and Dr. Vincent Gollogy
12 provided a Disability Determination Explanation. AR 80-90. They found there was
13 no evidence of severe physical impairment lasting or expected to last at least 12
14 consecutive months. AR 84. They also found that Plaintiff has sustained
15 concentration and persistence limitations, AR 86, and was moderately limited in
16 the following areas:

- 17 • The ability to perform activities within a schedule, maintain regular
18 attendance, and be punctual within customary tolerances;
- 19 • The ability to complete a normal workday and workweek without
20 interruptions from psychologically based symptoms and to perform at
21 a consistent pace without an unreasonable number and length of rest
22 periods;
- 23 • The ability to interact appropriately with the general public
- 24 • The ability to get along with coworkers or peers without distracting
them or exhibiting behavioral extremes;
- The ability to respond appropriately to changes in the work setting.

25 AR 87-88.

26 In addressing her limitations, they explained that:

- 27 • Clmt able to understand, remember & carry out SRT & complex
28 /detailed tasks. She may have some interruptions of her NL wk day
/wk week from Y sx, that may also affect her attendance on occ.

1 However she would be able to persist at SRT & familiar detailed
2 tasks.

- 3 • Clmt's anxiety would on occ affect her ability to interact well w /co-
4 workers & general public. However she would be able to interact on
5 superficial, limited level.
- Clmt able to respond appropriately to simple changes in routine.

AR 87-88.

6 Dr. Hale and Dr. Gollogly ultimately concluded Plaintiff was not disabled.

7 AR 89.

8 **Shannon Neer, PA-C**

9 On January 26, 2015, Shannon Neer completed a Medical Report. AR 294-
10 95. She identified Plaintiff's medical condition as having depression and labile
11 emotional health. AR 295. She indicated that work on a regular and continuous
12 basis would be affected because Plaintiff would be unable to cope with stressful
13 situations. AR 295. She believed that Plaintiff would miss 4 or more days a week
14 because her mental health issues were not 100% stable. AR 295.

15 **ALJ's Review of Medical Source Opinions**

16 All the medical sources agreed that Plaintiff suffered from depression and
17 anxiety. All the medical sources agreed that Plaintiff's depression and anxiety
18 would affect her ability to complete a 5 day, 40 hour work week. This is consistent
19 with the record, as Plaintiff never returned to full time work after her second
20 suicide attempt.

21 Dr. Gollogly concluded that Plaintiff's symptoms would affect her work
22 week occasionally, while Dr. Bauer concluded that Plaintiff would have moderate
23 difficulty maintaining regular attendance in the workplace. Ms. Neer indicated that
24 Plaintiff would miss more than 4 days a week. Whether these opinions mandate
25 the conclusion that Plaintiff cannot work a full-time job is the crux of the issue as
26 to whether Plaintiff is disabled.

27 With respect to Dr. Bauer's opinion, the ALJ only gave it some weight
28

1 because it believed Dr. Bauer gave an inconsistent opinion since she also wrote
2 Plaintiff was able to perform work activities on a consistent basis without special
3 or additional instructions, while at the same time opining Plaintiff would have
4 moderate difficulty maintaining regular attendance in the workplace, due to
5 interruptions caused by her psychiatric conditions. The ALJ also concluded Dr.
6 Bauer's opinion was contradicted by Plaintiff's social activities, based on Plaintiff
7 indicating to Dr. Bauer that she is social with some friends, she makes breakfast
8 for her husband for 30 years, and she likes to make homemade cards and wreaths.

9 Dr. Bauer is an examining medical source. Thus, in order to discount her
10 opinion, the ALJ must provide specific and legitimate reasons that are supported
11 by substantial evidence. The ALJ failed to do so. Throughout the opinion, the ALJ
12 relied on the fact that Plaintiff engaged in activities that indicate she is not as
13 limited as she claims. These activities include shopping at stores, mall and
14 computer, driving a car, going outside alone, and pulling weeds as some of her
15 yard work, as well as seeing friends, working craft projects and creating
16 homemade cards and wreaths. The problem with the ALJ's reliance on these
17 factors is that the longitudinal record does not substantiate these factors exist to a
18 significant degree to support the ALJ's conclusion. *See Orn v. Astrue*, 495 F.3d
19 625, 634-35 (9th Cir. 2007) (viewing the record in its entirety and noting that
20 where the ALJ's reasoning is belied by the record, it cannot constitute a "specific
21 and legitimate" reason for rejecting the controverted opinion).

22 For instance, her husband indicates that he is the one going shopping. While
23 Plaintiff testified that she went to the craft store after she had been to the dentist,
24 the record indicates that her trips to the store are few and far between. It is clear
25 she does not go to the store every week to shop. Similarly, while the ALJ relied on
26 the fact that she arranges flowers for her friends, this also happens few and far
27 between. She made an arrangement for a funeral that occurred four months prior to
28 the hearing. There is nothing in the record to suggest that Plaintiff routinely

1 interacts with her friends on a consistent basis. Plaintiff testified that she sees her
2 family every couple of months—not days or weeks. If she is not mentally feeling
3 well, she misses the family events, including saying goodbye to her nephew who
4 was leaving to go to Afghanistan.

5 Also, it is clear from the record that Plaintiff has good days and bad days.
6 On her good days, she can shop and go to work. On her bad days, she cannot. The
7 problem is that her bad days interferes with her ability to work five days forty
8 hours a week. This was the reason she was let go after working for a company for
9 17 years. The ALJ erred by failing to consider the entire record in determining the
10 extent Plaintiff’s daily living activities demonstrate her ability to work. The ALJ’s
11 conclusions that Plaintiff’s daily living activities are inconsistent with her alleged
12 limitations are not supported by substantial evidence in the record.

13 The ALJ erred in failing to provide specific and legitimate reasons for
14 giving less weight to Dr. Bauer’s opinions, notwithstanding the fact that she was
15 an examining medical source.

16 With respect to Dr. Gollogly’s opinion that Plaintiff’s psychological
17 symptoms would affect her attendance occasionally, the ALJ concluded that Dr.
18 Gollogly did not intend to use the term “occasionally” in the vocational way.
19 Rather, the ALJ assumed that because the use of the term “occasionally” did not
20 square with his conclusion that Plaintiff would be able to persist at simple routine
21 tasks, Dr. Gollogly must not have intended to use the term “occasionally” as a
22 term of art used in the social security context. However, the ALJ accorded Dr.
23 Gollogly’s opinion significant weight as expert-opinions within the meaning of
24 SSR 96-6p.²

25 ² State agency medical and psychological consultants are highly qualified
26 physicians and psychologists who are experts in the evaluation of the medical
27 issues in disability claims under the Act. As members of the teams that make
28 determinations of disability at the initial and reconsideration levels of the
administrative review process (except in disability hearings), they consider the

1 According to Social Security Administration Program Operations Manual
2 System (POMS), occasionally is defined as:

3 (34) Frequency of physical demands and environmental condition
4 components in the SCO³: With respect to the absence or presence of
5 physical demand and environmental condition components,
6 occasionally means: Activity or condition exists up to one-third of the
7 time.

8 (54) Occasionally. Use of this term in the SCO or RFC means that the
9 activity or condition occurs at least once up to one-third of an 8-hour
10 workday.

11 POMS DI 25001.001.

12 The ALJ's rationalization of Dr. Gollogly's use of the term occasionally
13 makes no sense. On the one hand, the ALJ views Dr. Gollogly's opinion as an
14 expert in the social security context, then concludes that Dr. Gollogly must not
15 have relied on his social security expertise when he used the term "occasionally."
16 Moreover, the use of the term occasionally by Dr. Gollogly is supported by the
17 record and by other opinions, including Dr. Bauer and Ms. Neer. The ALJ's

18 medical evidence in disability cases and make findings of fact on the medical
19 issues, including, but not limited to, the existence and severity of an individual's
20 impairment(s), the existence and severity of an individual's symptoms, whether
21 the individual's impairment(s) meets or is equivalent in severity to the
22 requirements for any impairment listed in 20 CFR part 404, subpart P, appendix 1
23 (the Listing of Impairments), and the individual's residual functional capacity
24 (RFC). . . . the opinions of State agency medical and psychological consultants
25 and other program physicians and psychologists can be given weight only insofar
26 as they are supported by evidence in the case record, considering such factors as
27 the supportability of the opinion in the evidence including any evidence received
28 at the administrative law judge and Appeals Council levels that was not before the
State agency, the consistency of the opinion with the record as a whole, including
other medical opinions, and any explanation for the opinion provided by the State
agency medical or psychological consultant or other program physician or
psychologist. The adjudicator must also consider all other factors that could have a
bearing on the weight to which an opinion is entitled, including any specialization
of the State agency medical or psychological consultant. SSR 96-6p.

³ Selected Characteristics of Occupations (SCO).

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 12**

1 interpretation of Dr. Gollogly's opinion is based on speculation and belied by the
2 record; therefore it is not supported by substantial evidence.

3 With respect to Ms. Neer's opinion, the ALJ accorded less weight to her
4 opinion because as a physician's assistant she is not an acceptable medical source
5 under SSR 06-03p and because she did not acknowledge any of Plaintiff's
6 concurrent activities. The ALJ believed that these activities reflect a higher level
7 of mental functioning than alleged.

8 Physician's assistants are defined as "other sources," 20 C.F.R. §
9 404.1513(d), and are not entitled to the same deference as treating or examining
10 physicians. SSR 06-03p. The ALJ may discount testimony from these "other
11 sources" if the ALJ "'gives reasons germane to each witness for doing so.'" *See*
12 *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010) (quoting
13 *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)). Those factors include the
14 length of the treatment relationship and the frequency of examination, the nature
15 and extent of the treatment relationship, supportability, consistency with the
16 record, and specialization of the doctor. *Revel v. Berryhill*, 874 F.3d 648, 655 (9th
17 Cir. 2017); *see also* 20 C.F.R. § 404.1527(c)(2)–(6). Under certain circumstances,
18 the opinion of a treating provider who is not an acceptable medical source may be
19 given greater weight than the opinion of a treating provider who is—for example,
20 when the provider "has seen the individual more often than the treating source, has
21 provided better supporting evidence and a better explanation for the opinion, and
22 the opinion is more consistent with the evidence as a whole." *Id.*; *see also* 20
23 C.F.R. § 404.1527(f)(1).

24 Here, the ALJ erred in failing to consider the factors set forth in 20 C.F.R.
25 § 404.1527(c)(2)-(6) in making its determination regarding the amount of weight
26 to give Ms. Neer's opinion. Although Neer is not an "acceptable medical source,"
27 she is an "other source" and there are strong reasons to assign weight to her
28 opinion. Neer was a treating source who treated Plaintiff since 2013 and

1 prescribed her medications to deal with her depression and anxiety. *See* 20 C.F.R.
2 § 404.1527(c)(1)–(2), (f) (explaining that an opinion from a source who has
3 examined the claimant and had a longer treatment relationship should generally be
4 given greater weight). Moreover, Ms. Neer was in a unique position as a primary
5 care provider, as she had an overview of Plaintiff’s conditions. The ALJ’s decision
6 to give Ms. Neer’s opinion little weight is not supported by substantial evidence.
7 As set forth above, the ALJ improperly assessed Plaintiff’s daily living activities
8 in concluding that her level of activities demonstrated the ability to work a five-
9 day, 40 hour work week.

10 In sum, the medical sources all agree that Plaintiff can perform simple and
11 routine tasks, and even complex tasks. The ALJ relied on this finding to conclude
12 that it would be inconsistent to be able to complete these tasks, but then also miss
13 work due to Plaintiff’s mental health limitations. The ALJ failed to explain how
14 these two findings are inconsistent. Also, there is no inherent reason to conclude
15 that these two findings are inconsistent. At issue is whether Plaintiff can work full-
16 time. The record supports only one conclusion. She cannot. As such, the ALJ erred
17 in rejecting the medical sources opinion that Plaintiff’s mental health limitations
18 would cause her to absent from work to a degree that full-time work would not be
19 sustainable.

20 *2. Whether the ALJ properly considered lay witness testimony from Glen Bangs*

21 The ALJ considered the third-party statement by Plaintiff’s husband, Glen R.
22 Bangs.

23 Mr. Bangs completed a Function Report on May 8, 2014, and also submitted
24 a letter. In his letter, he wrote, in part:

25 Throughout her employment with all of her employers her work
26 ethic and attendance was outstanding. All reviews Dari received
27 throughout the years about her work and attendance was
28 outstanding. None of her employers had a negative word to say
about her.

1
2 Dari was an outgoing and intelligent woman, mother and wife.
3 Always going to visit family and friends, never wanting to miss a
4 family function. We always took the children camping during the
summer weekly and generally to the ocean yearly.

5 In the winter of 1997-1998 you could see a significant change in her
6 personality. She seemed depressed and withdrawn. You could see
7 slight changes in her for up to a year or more prior to that. Not
wanting to do as many things with friends and family.

8 ***

9 In 2006 and 2007 you could see she was becoming more and more
10 depressed and reclusive. Dari did not want to go anywhere and
11 when friends would come over she would retreat to the bedroom
12 until everybody left. When I would confront her about her
13 behavior she would assure me everything was alright if I pushed
14 the issue she would get upset and go back to the bedroom. Dari all
15 but stopped going to see her family. She has 2 brothers who are
16 married with 2 children each a mother and at that time a
grandmother. In the early years she would go see her grandmother
on a weekly basis. Then less often as time passed. I cannot
remember when her grandmother passed away but after her
passing she would see her family even less.

17 Dari was missing work on a regular basis several times a week
18 using all her personal time off (PTO time). Which led to time off
19 without pay. In all Dari's years of employment she had never used
20 all her time off. We would take summer vacations and she may
21 have a couple sick days at the most. So it was very out of character
22 to call in so much she was losing [sic] pay. In January and
23 February of 2007, I believe it was 2007, she rarely made it to work
1 to 2 days per week. The people at Argus worked with her very
24 patiently during this time. Sometime I believe it was in February
she attempted suicide again.

25 Prior to the suicide attempt Dari was hearing voices and speaking
26 to things that were not there it was very scary behavior to see
27 someone you love to act this way. I am a correctional officer and
28 have worked with people with this behavior and symptoms in the
past. I knew what should have been done but, it was different when

1 it is somebody you love. I just kept trying to talk with her but she
2 was just not the person I had known all these years. Dari's thoughts
3 and behavior was just not her and I didn't or couldn't do what was
4 necessary. She would be up at all hours of the day and night babbling
and walking around.

5 You could not rationalize with her at all. This went against
6 everything I had ever known about her. Dari's employer Argus
7 had kept her job for her and for a few years she did well. They
8 gave her schedule of Monday, Tuesday, Thursday and Friday with
9 Wednesday, Saturday and Sunday off. In 2010 or there about Dari
10 started missing work on a regular basis again. Always saying she
11 just did not feel well. She would only visit family on special
12 occasions and then still at times not go for birthdays and holidays.
13 By the time January 2014 came around she had missed so much
14 work she was on no pay status. Her attention span was short and
sometimes conversations were hard to carry on with her because
she would take so much time trying to say what she wanted. Dari
had always weighed 135 to 145 pounds this medication over the
years has caused her to gain approximately 100 pounds.

15 ***
16

17 Dari has always loved arts and crafts making bows, flower
18 arrangements and greeting cards. So after loosing [sic] her job of
19 17 years she applied at a flower shop and worked there for 2
20 weeks. She loved her new job and thought everything was going
21 well. Her new employer was telling her what a good job she was
22 doing and she was happy. During the second week the owner asked
23 her if anyone had ever told her that she had a short attention span
24 or was distracted easily and proceeded to tell her it was not going
25 to work out and Friday would be her last day. Dari was crushed
26 and started crying so the owner said she would give her one more
27 week but Dari was so devastated she said no and has hardly
28 worked with arts and crafts since.

For year now she has had difficulty being around strangers and even
family and friends. She finds it hard to go out and do things she
would like to do. Some days are better than others and she will find

1 the strength to interact with others and go shopping. I do most of the
2 household shopping that needs to be done.
3 AR 232-33.

4 Mr. Bangs goes on to describe instances where Plaintiff was unable to
5 interact socially with her family and friends, either declining to go at the last
6 minute or hiding out in her bedroom and only coming out after the guests had
7 left. *Id.*

8 The ALJ accorded Mr. Bangs' testimony only some weight because his
9 descriptions portrayed an individual with some functional limitation, as
10 consistent with the established diagnoses, but not to the degree alleged in the
11 application for disability. AR 26.

12 Lay testimony as to a claimant's symptoms or how an impairment affects
13 the claimant's ability to work is competent evidence that the ALJ must take into
14 account. *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012). In order to
15 discount competent lay witness testimony, the ALJ must give reasons that are
16 germane to the witness. *Id.*

17 Here, the ALJ failed to provide germane reasons to reject Mr. Bangs'
18 testimony. As set forth above, the ALJ's erred in concluding that Plaintiff's
19 daily living activities were inconsistent with the inability to work on a full-time
20 basis. As this was the only reason for rejecting Mr. Bangs' testimony, the ALJ
21 erred in failing to fully credit his testimony.

22 *3. Whether the ALJ properly evaluated Plaintiff's symptom claims.*

23 The ALJ concluded that Plaintiff's statements regarding her limitations and
24 ability to work full-time were not supported by the record. As set forth above, the
25 ALJ erred in concluding that Plaintiff's activities were inconsistent with her claim
26 that she cannot work full-time.

27 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
28 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
evidence of malingering, the ALJ must give "specific, clear and convincing

1 reasons” for rejecting a claimant’s subjective symptom testimony. *Molina*, 674
2 F.3d at 1112 (citation omitted). If the ALJ’s credibility finding is supported by
3 substantial evidence in the record, the reviewing court “may not engage in second-
4 guessing.” *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

5 In recognition of the fact that an individual’s symptoms can sometimes
6 suggest a greater level of severity of impairment than can be shown by the
7 objective medical evidence alone, 20 C.F.R. §§ 404.1529(c) and 416.929(c)
8 describe the kinds of evidence, including the factors below, that the ALJ must
9 consider in addition to the objective medical evidence when assessing the
10 credibility of an individual’s statements:

11 1. The individual’s daily activities; 2. The location, duration,
12 frequency, and intensity of the individual’s pain or other
13 symptoms; 3. Factors that precipitate and aggravate the symptoms;
14 4. The type, dosage, effectiveness, and side effects of any
15 medication the individual takes or has taken to alleviate pain or
16 other symptoms; 5. Treatment, other than medication, the
17 individual receives or has received for relief of pain or other
18 symptoms; 6. Any measures other than treatment the individual
19 uses or has used to relieve pain or other symptoms (*e.g.*, lying flat
on his or her back, standing for 15 to 20 minutes every hour, or
sleeping on a board); and 7. Any other factors concerning the
individual’s functional limitations and restrictions due to pain or
other symptoms.

20 SSR 96-7P, 1996 WL 374186. Daily activities may be grounds for an adverse
21 credibility finding if (1) Plaintiff’s activities contradict her other testimony, or (2)
22 Plaintiff “is able to spend a substantial part of his day engaged in pursuits
23 involving the performance of physical functions that are transferable to a work
24 setting.” *Orn*, 495 F.3d at 639 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
25 1989)).

26 The Ninth Circuit has “warned that ALJs must be especially cautious in
27 concluding that daily activities are inconsistent with testimony about pain,
28 because impairments that would unquestionably preclude work and all the

1 pressures of a workplace environment will often be consistent with doing more
2 than merely resting in bed all day.” *Garrison*, 759 F.3d at 1016. Recognizing that
3 claimants should not be penalized for attempting to lead their normal lives, “only
4 if Plaintiff’s level of activity is inconsistent with his claimed limitations would
5 these activities have any bearing on his credibility.” *Id.*

6 The ALJ erred in concluding that Plaintiff’s participation in crafts and
7 reading indicates that she does not have concentration issues. There is no
8 correlation between working on crafts or reading when you have good days and
9 working full-time without missing work on your bad days. The activities relied
10 upon by the ALJ, *i.e.* buying flowers, having a small group of friends, and
11 remaining married, do not translate into skills needed to sustain full-time work.
12 The Court is especially concerned that the ALJ relied on the fact that Plaintiff has
13 remained married for 30 years as a reason to discredit her symptom testimony.
14 The Court does not see the connection. Does the ALJ believe that if Plaintiff’s
15 mental health issues were as bad as both she and her husband indicate, there is no
16 doubt her husband would have divorced her? It is both illogical and disturbing to
17 rely on Plaintiff’s stable and long-lasting marriage as a reason to discredit her
18 testimony.

19 The ALJ also relied on the fact that Plaintiff collected unemployment
20 during the same period that she claims she became disabled. The ALJ surmised
21 that in order to collect unemployment, Plaintiff would have to hold herself out as
22 capable and available for full-time work. AR 24. While continued receipt of
23 unemployment benefits does cast doubt on a claim of disability, as it shows that
24 an applicant holds herself out as capable of working, the fact that Plaintiff
25 attempted to return to work and was unsuccessful supports her claim for disability.
26 *See Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th Cir. 2014). Here, the record
27 demonstrates that during this time period, Plaintiff was unsure if she would be
28 able to work full-time, she tried to do so, and after two weeks, she was fired.

1 **Conclusion**

2 The ALJ erroneously discounted the medical opinion evidence, Plaintiff's
3 testimony, Mr. Bangs' testimony and other evidence that clearly indicates Plaintiff
4 is unable to sustain full-time work. The only question then, is whether to remand a
5 case for additional evidence or simply award benefits. *Sprague v. Bowen*, 812 F.2d
6 1226, 1232 (9th Cir. 1987). The Ninth Circuit has instructed that where (1) the
7 record has been fully developed and further administrative proceedings would
8 serve no useful purpose, (2) the ALJ has failed to provide legally sufficient
9 reasons for rejecting evidence, whether claimant testimony or medical opinion;
10 and (3) if the improperly discredited evidence were credited as true, the ALJ
11 would be required to find the claimant disabled on remand" the court should
12 remand for an award of benefits. *Trevizo*, 871 F.3d at 683.

13 Here, remand for the calculation and award of benefits is warranted.

14 //

15 //

16 //

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 10, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, ECF No. 11, is **DENIED**.

3. The decision of the Commissioner denying benefits is **reversed** and **remanded** for an award of benefits, with a disability onset date of February 4, 2014.

4. The District Court Executive is directed to enter judgment in favor of Plaintiff and against Defendant.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order, provide copies to counsel, and close the file.

DATED this 24th day of September 2018.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge